

**CleanPower, Inc. and Service Employees International Union, Local 150, AFL-CIO, CLC.**  
Case 30-CA-12220

February 27, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On December 8, 1994, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CleanPower, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> Contrary to the Respondent's contention, the credited testimony shows that the Respondent knew of the concerted nature of employee Mark Kessenich's activities.

*Gerald McKinney, Esq.*, for the General Counsel.

*Ronald S. Stadler, Esq.*, of Brookfield, Wisconsin, for the Respondent.

*Julie Eisenberg*, of Milwaukee, Wisconsin, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

PETER E. DONNELLY, Administrative Law Judge. The charge herein was filed by Service Employees International Union, Local 150, AFL-CIO, CLC (the Union or Charging Party). A complaint thereon issued on September 29, 1993, alleging that CleanPower, Inc. (the Employer or Respondent) violated Section 8(a)(1) of the Act by James Gambino, operations manager, in threatening an employee, Mark Kessenich, with discharge for complaining to a building manager about the working conditions of employees. The case was heard before me on September 23, 1994. A brief has been timely filed by Respondent which has been duly considered.<sup>1</sup>

<sup>1</sup> At the close of the hearing, General Counsel submitted a "Supportive Memorandum" setting out facts, issues, and legal arguments supporting his position. However, any references contained therein to matters not made part of the record at the instant hearing, includ-

**FINDINGS OF FACT**

**I. EMPLOYER'S BUSINESS**

Employer is a corporation engaged in the business of contract janitorial services in the Milwaukee, Wisconsin area. During the calendar year ending December 31, 1992, Respondent, in the course and conduct of its business operations, provided services valued in excess of \$50,000 for enterprises within the State of Wisconsin, which themselves sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of Wisconsin. The complaint alleges, the answer admits, and I find that the Employer is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Facts<sup>2</sup>**

Respondent provides contract janitorial services to approximately 120 to 130 buildings located in Wisconsin, including some 80-100 buildings in Milwaukee. None of the Respondent's approximate 900 janitorial employees are represented by a union. Mark Kessenich was employed by Respondent on May 15, 1993,<sup>3</sup> in Milwaukee where he worked until he left his employment with the Company on August 2. Kessenich started as a substitute at various Milwaukee buildings until sometime in early June, when he was assigned permanently to an office building at 1000 North Water Street in Milwaukee cleaning restrooms. Kessenich worked on a crew of 15 to 18 employees, and his normal work hours were from 5 p.m. to 8:30 p.m.

It was at about this time that he and other employees were assigned to do additional work but given no additional time to accomplish it.

Having become dissatisfied with this development, Kessenich discussed the problem with other employee-members of his work crew at the building who shared Kessenich's view that the increased workload, without additional time, was unfair. He expressed this view to management in the form of Junette Strika, manager, and Gerald Griffin, assistant manager, telling them that the present arrangement was too difficult and stressful, and that he heard other crewmembers say basically the same thing. In early or mid-July, Respondent allowed an additional 15 minutes of

ing reference to any affidavits not in evidence, have been disregarded.

<sup>2</sup> There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities, the probabilities in light of other events, corroboration or lack of it, and consistencies of inconsistencies within the testimony of each witness. In evaluating the testimony of witnesses, I rely specifically upon their demeanor and have made my findings accordingly. While apart from consideration of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161 (1966). Specifically, I conclude, in those instances where a conflict exists between the testimony of Kessenich and Gambino, that Kessenich's testimony is the more credible.

<sup>3</sup> All dates refer to 1993 unless otherwise indicated.

pay per shift for the additional work. Nonetheless, in about mid-July, Kessenich began to discuss with other employees the possibility of drafting a petition, setting out what they viewed as unfair work assignments and presenting it to Respondent's management on the theory that the complaint would be more effectively presented collectively than as individuals. Several employees, including Kessenich, contributed to the language of a petition which was drafted and typed by Kessenich. The petition reads:

During the past two weeks, we have been overloaded with new work assignments. CleanPower does not give us enough time to do all of this new work. We try to do all this new work, but we cannot do a quality job in the time given. Stop the unfair work assignments!

The petition was signed by Kessenich and four other crewmembers, including Greg Adams. Thereafter, Kessenich solicited Griffin to sign the petition, but Griffin declined saying that he was a management employee and did not want to jeopardize his position.

On about July 25, Kessenich and Adams discussed the possibility of going to the building manager, James Gulden,<sup>4</sup> to voice their complaint in the hope that Gulden would speak to the Respondent and help to resolve the problem.

On the following day, Kessenich and Adams went to see Gulden in his office at the building before work at about 4:30 p.m. Kessenich complained to Gulden about the increased workload with no additional time and explained that Respondent had been insensitive to the matter and asked Gulden if he could help them. Gulden said that he would be seeing Timothy Dittman, president of Respondent, and that he would talk to him about the matter.

Kessenich also told Gulden that he and Adams were not the only ones dissatisfied and that several of the crew had put together a petition protesting the problem. Gulden asked to see the petition, but Kessenich declined since he felt that the petition was incomplete since all of the crewmembers had not yet signed it.

On about July 29, Respondent held a meeting of employees at the North Water Street building. The meeting began with employee awards for length of service followed by an address by James Gambino, Respondent's operations manager. Gambino told those assembled that he was aware that the Union was talking to them but that they should be sure that they get both sides of the story and that all the Union wanted was to get a contract and take dues out of their paychecks.

When he was finished, Gambino asked if there were any questions and Kessenich raised the matter of having too much work for the time available on the shift. Gambino told him that those arrangements were simply the way that the Company was doing it. Kessenich complained that it was unfair to require such a heavy workload and told Gambino that the employees on the crew had put together a petition and that they had seen the building manager. Gambino denied that Kessenich told him that anyone had gone with him to see Gulden, however Kessenich's testimony in this regard is more credible, as noted above. Gambino concedes that he told Kessenich that he should not have done that and that the

Company had a policy of open communications and that he should have brought the matter to the attention of management. Gambino told Kessenich that if property managers wanted to deal with such problems, they could do the maintenance work themselves. Gambino also stated that by going to the building manager, Kessenich had jeopardized the Company as well as the people he worked with because the owners could look for another contractor to do the maintenance work. The matter was left with Gambino saying that he would look into the problem and get back to them.

On about August 2 at about 7 p.m., Gambino again visited the building. Kessenich was cleaning a bathroom when Gambino came in to speak to him. No one else was present. Gambino told Kessenich that he had gone around speaking to others on his crew and that no one seemed to have any complaints except him. Kessenich asked Gambino how he expected crew members to respond to a company executive. Kessenich told Gambino that if he were the only one with a complaint, he would leave, but he knew that there were others with the same complaint.

Gambino asked Kessenich what he planned to do with the petition and Kessenich responded that he planned to get some more signatures on it and show it to the building manager and the tenants in the building. Gambino told Kessenich that he was way out of line and that he had no right to bring the petition to those people and that by so doing it would jeopardize the jobs of his crew and other building employees. Further, that if he continued to talk to the building manager, he would be fired. Gambino denied telling Kessenich that he would be fired but admits saying that he would be disciplined. For the reasons expressed above, I credit Kessenich who then stated that he would do what he felt had to be done. It appears that neither Gulden nor Gambino was ever shown the actual petition.

#### *B. Discussion and Analysis*

The basic facts are not in dispute. The record discloses that Kessenich was threatened with discharge for expressing to Gambino his intention to bring to the attention of a third party, Gulden, the building manager, an employee petition about having too much work to do on their shifts.

Section 8(a)(1) of the Act provides, *inter alia*, that employees are entitled to engage in protected concerted activity, free from interference on the part of the employer.

A threat to discharge is clearly interference, but the question in this case is whether or not the threat was directed to activity that was protected and concerted.

As to the question of being protected activity, it is clear that the preparation, circulating, and signing of a petition related to the working conditions of employees by employees is protected activity and that threats directed against such activity constitutes a violation of Section 8(a)(1) of the Act. *Liberty Natural Products*, 314 NLRB 630 (1994). The instant case, however, presents another question, since the threat was not directed at the formulation and circulation of a petition itself, but was directed to Kessenich's remark that he intended to bring the complaint and the petition to the attention of a third party, the building manager who represents the owners of the building, in an effort to have him intercede with Respondent in resolving the problem. In my opinion, this is also protected activity. The record does not disclose that it was the intention of Kessenich to damage Respondent

<sup>4</sup> Gulden was employed by the owners of the building and was not an employee of Respondent.

by causing the building owners to sever their contract with Respondent and thereafter to contract maintenance services to a union contractor. It was the testimony of Kessenich that he and Adams were motivated to speak to Gulden only to seek relief from the overload work problem. While it is true that Kessenich's seeking such third-party intercession may not have been desirable for Respondent in circumstances where the Union was actively seeking to organize, the evidence does not support the conclusion that Kessenich's intentions were in furtherance of that effort. In short, I conclude that Kessenich and Adams were reaching out to Gulden to seek his assistance in helping to resolve a work dispute and this was protected activity. *Phoenix Newspapers*, 294 NLRB 47, 50 (1989); *Allied Aviation Service Co.*, 248 NLRB 229 (1980).

Having concluded that Kessenich's intended activity was protected, was it also concerted? Respondent argues that Kessenich was speaking only for himself in pursuing this complaint and that he was not engaged in any activity in concert with other employees as required by the Act. I disagree. The facts fully support the conclusion that the overwork problem was discussed among employee crewmembers. Thereafter, a petition was drafted and signed by five crew members. Prior to the conversation in issue on about August 2, Kessenich and Adams both went to Building Manager Gulden to solicit his assistance with their complaint and that is what Kessenich told Gambino in his conversation with Gambino on July 29. While Gambino characterized the complaint as individual to Kessenich, the testimony of Kessenich, which I have credited, makes it clear that his intention was to get more signatures for the petition and again present it to the building manager and to the tenants. This intention was expressed to Gambino. This would have been protected activity.

In summary, I conclude that when Kessenich told Gambino that he intended to bring a petition signed by employees describing a work-related complaint to the building manager for the purpose of soliciting the building manager to intervene with the Respondent on behalf of employees, he was engaged in protected concerted activity and Gambino, by threatening him with discharge for engaging in that activity, violated Section 8(a)(1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent Employer's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it appears that Respondent no longer has a maintenance contract for the 1000 North Water Street building, posting at that facility would provide no meaningful relief. Instead, I shall recommend that Respondent be ordered to mail, by regular mail, copies of the notice provided for herein to all employees employed by Respondent at that building on August 2, the date on which the unfair labor practice herein occurred.

The General Counsel also requests that remedial relief include posting of notices at each of the Respondent's current building accounts where employees who were performing cleaning services for Respondent at the 1000 North Water Street account during the months of July and August 1993 are now employed. In my opinion, the relief set out above is adequate and the General Counsel's request for additional relief is denied.

#### CONCLUSIONS OF LAW

1. Respondent CleanPower, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By threatening employees with discharge for engaging in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, CleanPower, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for bringing work-related complaints to customers of the Respondent for the purposes of seeking their assistance in resolving such complaints.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In lieu of posting, notices, after being signed by Respondent's authorized representative, shall be mailed, by regular mail, as provided for in the remedy section above.<sup>6</sup>

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge for bringing work-related complaints to customers of CleanPower, Inc. for the purposes of seeking their assistance in resolving such complaints.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CLEANPOWER, INC.